Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner, Jim Rose, Warden, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered in this proceeding on January 9, 1978, wherein the Court of Appeals reversed the United States District Court and issued writs of habeas corpus for the respondents, two prisoners incarcerated by the State of Tennessee.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on January 9, 1978, is reported as *Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978), and is attached hereto as Appendix A.

This case arose as separate petitions for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. In the district court these cases were originally styled: *Mitchell v. Rose, Warden*, Civil C-75-222, and *Nichols v. Rose, Warden*, Civil C-75-265. On February 17, 1976, an order was entered by the district court, dismissing most issues raised in the petitions. A copy of this order is attached hereto as Appendix D. On February 17, 1977, another order was entered by the district court dismissing the remaining claims and entering judgment for the state. A copy of this memorandum and order is attached hereto as Appendix C. On March 23, 1977 a further order was entered by the district court denying a motion for amendment and stating further grounds for the court's decision. A copy of this order is attached hereto as Appendix B. The memorandum decisions and orders of the district court are not reported.

The opinion of the Tennessee Court of Criminal Appeals, affirming the conviction of Mitchell and Nichols, was filed on June 5, 1974; and a copy is attached hereto as Appendix F. This opinion is not reported. The Supreme Court of Tennessee denied certiorari on March 10, 1975. A copy of that court's order is attached hereto as Appendix E.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on January 9, 1978. The state's petition to rehear was denied by order of that Court filed on March 30, 1978. This petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

§ 2254. State custody; remedies in Federal courts:

. . . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for

hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

Tennessee Code Annotated provides in pertinent part as follows:

40-1506. Appointment and term of foreman or forewoman.—Judges having criminal jurisdiction in any county, are authorized, and required to appoint the foremen or forewomen of the grand juries in the counties of their respective jurisdictions; and said foremen or forewomen shall hold office and exercise their powers for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved, or excused from office at any time. Said foreman or forewoman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof. [Acts 1919, ch. 37, § 1; Shan. Supp., § 5832a1; mod. Code 1932, § 10026; Acts 1976 (Adj. S.), ch. 383, § 1.]

Amendments. The 1976 amendment inserted the words "or forewomen" each place they appear and in the last sentence inserted "or forewoman."

40-1507. Qualifications of foreman or forewoman.—Every person appointed as a foreman or forewoman of the grand jury under § 40-1506 shall be at least twenty-five (25) years of age, and shall be a good and lawful man or woman, possessing all the qualifications of a juror. Provided that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury. the provision of this section requiring that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury shall not apply in those

counties where arraignment in criminal cases is had exclusively before general sessions court. [Acts 1919, ch. 37, § 2; Shan. Supp., § 5832a2; Code 1932, § 10027; Acts 1957, ch. 252, §§ 1, 2; 1976 (Adj. S.), ch. 383, § 2.]

40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced, and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney. [Acts 1919, ch. 37, § 4; Shan. Supp., § 5832a4; Code 1932, § 10029; Acts 1976 (Adj. S.), ch. 383, § 5.]

40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill," and the indorsement signed by the foreman. [Code 1858, § 5093; Shan., § 7055; Code 1932, § 11600.]

QUESTIONS PRESENTED

1. Whether Discrimination in the Selection of the Non-Voting Foreman of the Grand Jury Is a Basis Upon Which a State Prisoner May Be Granted Federal Habeas Corpus Relief When the Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the State Has Provided an Opportunity for Full and Fair Litigation of the Claim?

2. Whether the Decision of the Court of Appeals Comports With the Clearly Erroneous Standard and With This Court's Decisions Interpreting the Equal Protection Clause?

3. Whether, Assuming Arguendo, Systematic Exclusion of Blacks From the Post of Grand Jury Foreman in Tipton County, the Doctrine of Harmless Error Can Be Applied, When There Has Been No Actual Prejudice and No Rational Basis Exists Upon Which to Presume Prejudice?

STATEMENT OF THE CASE[1]

On October 28, 1972 Claudie Greer and William Nabors were murdered by the respondents during an armed robbery of a cafe[2] in Tipton County, Tennessee. The respondent Nichols began the criminal episode by pistol-whipping a customer. Then Nichols, wielding two pistols, forced the proprietor to hand over about five or six hundred dollars. Nichols also took other money from the proprietor and customers in the cafe. Then, for no apparent reason, Nichols fired several shots into the back room of the cafe and fled. Eyewitnesses testified that Claudie Greer, standing in the back room, fell and subsequently died after the shots were fired from the front room. Proof later showed that Greer was killed by a shot from a .38 caliber pistol.

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[1] Unless otherwise indicated, the references contained within this statement are to pages of the state court record. The state court record was before both the federal courts below.

[2] The race of the defendants, the victims, or the eye-witnesses was, of course, not an issue at trial. However, since the Court of Appeals has found racial discrimination and presumed prejudice, the race of these people is perhaps relevant here to demonstrate the total absence of prejudice and the lack of any evidence showing discriminatory intent. The only evidence of race appears in Volume II, page 87 of the trial where on redirect examination the cafe's proprietor testified he is black and black customers comprised almost 100 per cent of his business. There is nothing in the record to support any conclusion except that the victims and witnesses were also black.

Simultaneously, the co-respondent James Mitchell, armed with a sawed-off shot gun, was in the process of robbing persons in the back room. William Nabors was among these people. When Nabors bent over to pick up some change from the floor, Mitchell shot him through the mouth with the sawed-off shot gun, ending his life. Mitchell then went into the front room, took more money from the proprietress and also fled.

The next day Mitchell and Nichols were arrested together in Memphis in the apartment of Nichols' girlfriend. A .38 caliber pistol was recovered from Nichols at the time of his arrest, and a ring taken during the robbery was found at the scene of arrest. A sawed-off shot gun and blood splattered clothing were then found in the apartment of Mitchell's girlfriend. After his arrest, Mitchell gave a confession to members of the Memphis Police Department.

Nichols and Mitchell were jointly indicted in two indictments on November 6, 1972. The grand jury was composed of twelve jurors, one of them was a black woman, and one acting foreman. The regular foreman of the grand jury was unavailable and the trial judge chose a former foreman as his substitute. The former foreman was chosen to serve by the trial judge because he had previously served as a regular foreman, had previously served as an acting foreman, had been willing to perform in the past, and according to the judge's experience had always served well.[3] Although some twenty (20) witnesses were scheduled to testify before the grand jury, the grand jurors unanimously voted to indict the respondents after hearing one police officer testify. The testimony of the officer primarily consisted of recounting Mitchell's confession. This witness did not mention the race of the respondents and this fact was not known to either the acting foreman or the other members of the grand

[3] *See* Affidavits submitted by the state trial judge and the acting foreman. These affidavits formed part of the state's response in the U.S. District Court and were also before the Court of Appeals.

jury.[4] The acting foreman did not vote on the indictment because of the unanimity, but he did sign the indictment, as is required by Tennessee law. (T.C.A. § 40-1706).

Prior to trial, the petitioners filed a plea in abatement asking for dismissal of the indictment and alleging the grand jury and foreman were selected in a constitutionally offensive manner. (p. 21). On March 13, 1973 an evidentiary hearing was held in state court. At that hearing, three jury commissioners of Tipton County, three former foremen of the Tipton County Grand Jury, the entire grand jury which indicted the petitioners, and the circuit court clerk of Tipton County all testified. All witnesses were subject to full examination by counsel for the respondents. The proof elicited demonstrated the plea in abatement was without merit. There was a total lack of countervailing evidence. The state court overruled the plea in abatement.

Trial was held on March 21 and March 22 of 1973 in the Circuit Court of Tipton County. The state introduced the testimony of five eyewitnesses who identified Nichols and five eyewitnesses who identified Mitchell as the murderers. (pp. 65, 70, 90, 92, 98, 126, 131, 142, 143, 211, 242, 243, 244, 255, 266, 282). In addition, a redacted version of Mitchell's confession was introduced. Proof showed the recovery of the murder weapons from the respondents and showed that a ring stolen during the crime was recovered from the scene of arrest. The defense proof consisted almost wholly of a testimonial denial by Nichols of any participation. The jury found both respondents guilty of first degree murder and sentenced them to sixty years incarceration on each count. (pp. 357-360).

The respondents appealed their convictions first to the Tennessee Court of Criminal Appeals where they made some twelve assignments of error including assignments attacking the com-

[4] *See* Affidavit of acting foreman and Volume I of the state record, which contains the testimony on the plea in abatement.

position of the grand jury and the selection process for grand jury foreman. In a unanimous opinion, the Court of Criminal Appeals affirmed the convictions and found, "the facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds". (See Appendix F) The Supreme Court of Tennessee denied certiorari. (See Appendix E).

The respondents' resort to the federal court system began as separate applications for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. The initial petitions for habeas corpus relief each included some eleven grounds. In the district court, the cases were consolidated and twice referred to the magistrate for report. The state filed four separate responses, the entire state trial transcript, and affidavits from the state trial judge and the acting foreman of the indicting grand jury. After reviewing the first state response, the state trial court record, and the first report on reference, the district judge, on February 17, 1976, dismissed all claims except the selection issues and a *Bruton* issue. (*See* Appendix D). On these issues, the district court ordered further response and another reference to the magistrate. On February 17, 1977, by memorandum and order, the district court found the *Bruton* violation to be harmless beyond a reasonable doubt and further found that the acting foreman was selected for other than racial reasons. The petitions were dismissed. (*See* Appendix C). A final order denying a motion to amend judgment was entered by the district court on March 23, 1977. (*See* Appendix B).

The respondents appealed to the Court of Appeals for the Sixth Circuit which reversed the district court on January 9, 1978. (*See* Appendix A). The Court of Appeals found discrimination in the selection of the grand jury foreman in Tipton County, and set aside the convictions. The state is ordered to reindict the respondents in sixty (60) days or release them.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals for the Sixth Circuit has voided two state first degree murder convictions obtained more than five years ago. The Sixth Circuit's decision is based on a finding that the non-voting acting foreman of the indicting grand jury was selected in a discriminatory manner. The Sixth Circuit has granted federal habeas corpus relief to the respondents despite a record which demonstrates that:

1. The race of the respondents was unknown to either the acting foreman or other members of the grand jury;

2. the grand jury contained a black woman, who testified in state court and established the total absence of any racial consideration;

3. the regular foreman was unavailable and a former foreman was picked by the trial judge to replace him selely because the trial judge knew of his demonstrated ability, his willingness to serve, and his availability;

4. the acting foreman did not vote on the indictment because of the grand jury's unanimity;

5. although some twenty witnesses were scheduled, the grand jury unanimously voted for indictment after hearing one witness;

6. the selection of the grand jury itself is an issue previously resolved in favor of the state;

7. the subsequent trial was without reversible constitutional error and the petit jury was not an issue;

8. the evidence against respondents at trial included five eyewitness identifications for each, a confession, recovery of the murder weapons from the respondents, and other physical evidence; and

9. the issue of grand jury foreman selection was fully and fairly litigated in state court.

More simply stated, the Sixth Circuit has granted federal habeas corpus relief on the basis of perceived error occurring during the now moot accusatorial stage. The relief has been granted without a demonstration of prejudice and upon a record which can not support any reasonable presumption of prejudice. The relief was granted after three state courts had denied relief, and the district court had dismissed the petitions without an evidentiary hearing. The Sixth Circuit's grant of federal habeas corpus relief is contrary to the recent decisions of this Court interpreting the substantive scope of the writ. The issuance of the writ of habeas corpus in this case is contrary to the historical and meaningful purposes of the writ. The record demonstrates with unmistakable clarity that there is no unconstitutional deprivation of liberty. Furthermore, any incremental remedial benefit to the system is clearly outweighed by the cost to the system and society. Such benefit is available through other means, at much less cost. The criminal justice system suffers when the writ of habeas corpus issues solely as a remedial device when no real question of possible innocence exists.

The decision of the Sixth Circuit is a departure from the acceptable and usually applied clearly erroneous standard, which controls an appellate court's review in habeas corpus.

The decision of the Sixth Circuit has cast grave doubt upon the continued viability of Tennessee's system for selecting grand jury foremen or forewomen, a system essentially similar to those used in other states. The Sixth Circuit's rejection of the pragmatic reasons for the selection of the acting foreman here imposes a standard which can only be met by a random selection system or a system of affirmative action. Key man systems must either remove all discretion or install a conscious affirmative action policy. The Sixth Circuit has, in effect, held that a prima

facie case, built on questionable statistics, can not be rebutted by a plausible, non-racially motivated explanation. This is contrary to the decisions of this Court interpreting the Equal Protection Clause.

The Writ of Certiorari should be granted to enable this Court to review the substantive scope of federal habeas corpus; to allow this Court to remedy the errors relating to the clearly erroneous standard and the Equal Protection Clause; and finally, so that this Court may decide whether the harmless error doctrine should apply.

ARGUMENT

I

State Prisoners Should Not Be Granted Federal Habeas Corpus Relief on a Claim Questioning the Selection of the Non-Voting Foreman of Their Grand Jury When Their Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the Claim Has Been Fully and Fairly Litigated in State Court.

The Great Writ, habeas corpus ad subjiciendum, has deservedly enjoyed a prestigious place in the history of Anglo-American jurisprudence. Elaborate and scholarly discussions of the Great Writ and its evolvement can be found in the decisions of this Court and other legal writings. *See Fay v. Noia*, 372 U.S. 391, 399-426, 449-463 (1963); *Prieser v. Rodriguez*, 411 U.S. 475, 484-487 (1973); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 3042-3046 (1976); "Developments in the Law—Federal Habeas Corpus," 83 *Harv.L.Rev.* 1038, 1042-62, 1263-74 (1970); Oakes, "Legal History in the High Court—Habeas Corpus," 64 *Mich.L.Rev.* 451-68 (1966); Bator, "Finality in

Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv.L.Rev.* 441, 463-507 (1963). As Mr. Justice Powell wrote in *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973):

> Much, of course, has transpired since that first Habeas Corpus Act (citations omitted). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction (citations omitted), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims (citation omitted); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions (citation omitted).

The noble purpose of the Great Writ was and should remain to determine whether a violation of a personal constitutional right has resulted in the deprivation of liberty. *See Fay v. Noia*, 372 U.S. at 423, 424. However, through the years this noble purpose has been joined by other purposes as the substantive scope of the writ was expanded. The expansion has resulted from the employment of the Great Writ to further society's interest in preserving the integrity of the judicial system and implementing minimum constitutional standards within the nation's criminal justice system. Society's interests have been fostered by this expansion, but the issue of undeserved or unjust incarceration has become almost secondary. In fact, since this Court's decision in *Fay v. Noia*, federal habeas corpus relief has, in reality, been a continuation of the state appellate process. Society's interests now demand a reconsideration of the applicability of this form of relief to constitutional errors preceding the trial which have no real relationship to the deprivation of liberty. The issuance of the writ should again depend primarily on a relationship between constitutional error and deprivation of liberty. This case presents a classic situation for this Court to

consider whether moot pre-trial questions which do not affect the integrity of the trial are cognizable on federal habeas corpus.

In the landmark decision of *Stone v. Powell, supra*, (1976), this Court held "that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[5] The proposition here put forth is that the rational of *Stone* should extend beyond cases involving Fourth Amendment claims and should encompass a case such as the one sub judice, where a constitutional infirmity[6] occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction. This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the district court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated:

> Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L. Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in the state court to be correct, but also it

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[5] *Stone*, 96 S. Ct. at 3045, 3046.

[6] This characterization is solely for the purpose of presenting this portion of the petition. No concession of error in the selection process is intended.

> appears that, since the contention was fairly heard in state court petitioners are not entitled to another review here.

(*See* Appendix B-2).

In *Castaneda v. Partida*, 430 U.S. 482 (1977), Mr. Justice Powell, in dissent,[7] specifically recognized "a strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell* . . ." Mr. Justice Powell explained in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As stated by Mr. Justice Powell:

> Unlike the prisoner in *Stone*, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in Stone, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

See Castaneda, at 1287, footnote 1.

The matter *sub judice* presents facts more appropriately suited for an application of the *Stone* rationale than the facts before this Court in *Castaneda*. In *Castaneda* the composition of the entire Grand Jury was in question. In this matter, only the

[7] Mr. Justice Powell's dissent was joined by the Chief Justice and Mr. Justice Rehnquist. Mr. Justice Stewart, separately dissenting, stated that he was in substantial agreement with the other dissenting opinions. *Castaneda*, at 1287. The issue of extending the rationale of *Stone*, was not before the Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in this Court.

selection of the non-voting foreman is in question. Furthermore, in *Castaneda* the Mexican-American surname of the defendant is a fact upon which a presumption of prejudice could rest. In the instant matter the evidence demonstrates that the race of respondents was unknown to the grand jury when the indictment was returned.

As indicated in *Castaneda*, there is no peculiar characteristic regarding claims of grand jury selection irregularities which would weigh against an extension of the *Stone* logic beyond the Fourth Amendment. This Court has previously stated federal habeas relief is not automatically available to a state prisoner who pled guilty and later attacked the grand jury selection process, *Tollett v. Henderson*, 411 U.S. 258, 266, 267 (1973). More recently this Court held a state prisoner was not entitled to habeas relief on grand jury selection grounds when he failed to conform with a state requirement that such objections be raised before trial, absent a showing of both cause and actual prejudice. *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Both the result and rationale of *Stone*, *Henderson*, and *Tollett* are inconsistent with the decision of the Sixth Circuit in this case.

The Sixth Circuit has not determined that Tennessee is incarcerating two possibly innocent individuals. Any reasonable man viewing the overwhelming evidence admitted at trial must conclude that retrial will reach the same result if the state can resurrect evidence which is now more than fiveand one-half years old.[8] Therefore, if guilt is unquestioned, if the trial is

[8] This condition is not a small consideration, and is a significant cost factor. Reconstruction of a trial is never a certainty, especially after five and a half years. The cost to society in terms of money is obvious. The cost in other terms is also quite clear. *See, Stone*, 96 S.Ct. at 3050-52; *Schneckloth*, at 259 (Powell, J., concurring) and *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting). Perhaps, the biggest cost is the loss of public confidence in the system. The system has obviously failed when the cost overcomes the benefit. The criminal justice system should not be a game of endurance where guilt or innocence is a secondary consideration.

without reversible flaw, and if there is no basis to reasonably presume any prejudice to respondents from the perceived error, then the rationale supporting the writ's issuance must be remedial. The Sixth Circuit's opinion supports this conclusion: ". . . there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (*See* Appendix A-7). The result is that a conviction, no matter how overwhelming, can not withstand a pre-trial procedural constitutional error unrelated to the fact finding process. This philosophy is remedial and similar to the rationale which formerly supported federal habeas relief to state prisoners asserting Fourth Amendment claims. Under the mandate of *Stone*, the incremental benefits must be weighed against the substantial societal costs. In this case the costs clearly outweigh the benefit and alternative methods exist for obtaining the benefits at less cost.[9]

II

The Sixth Circuit's Decision Does Not Comport With the Clearly Erroneous Standard and Is Contrary to Decisions of This Court Regarding the Equal Protection Clause.

Tennessee uses the key man system of jury selection. Three jury commissioners are appointed by the trial judge in each county. Following statutory guidelines, these commissioners compile a jury pool from which both grand and petit juries are

[9] *Turner v. Fouche*, 396 U.S. 346 (1970) and *Carter v. Jury Commission*, 396 U.S. 320 (1970) were not habeas cases and demonstrate the benefits can be achieved through class action litigation without much of the cost attendant to habeas corpus proceedings. Other alternatives also exist including criminal sanctions, 18 U.S.C. § 243; and the state remedies which in Tennessee include two levels of appellate review and the state post-conviction law. Tenn. Code Ann. § 40-3801, et sequel. Finally, an individual is entitled to seek the direct review of this Court after a decision of the State Supreme Court.

randomly drawn. *See* Tenn. Code Ann. § 22-223-243 and Tenn. Code Ann. § 40-1501-1505. The grand jury foreman or forewoman.[10] is selected in a different manner. The criminal court judge appoints the foreman for a term of two years. The foreman may be chosen from the general population, must be twenty-five years old, and otherwise qualified to serve on the grand jury. *See* Tenn. Code Ann. §§ 40-1506, 1507. The foreman becomes the thirteenth grand juror and is required by law to sign all true bills. Tenn. Code Ann. § 40-1506, 1706.[11]

The United States Constitution does not guarantee to a state defendant the right to a grand jury. *Hurtado v. California*, 110 U.S. 516 (1884). However, this Court has long held that a criminal defendant is denied equal protection of the law if, as a result of purposeful discrimination, members of his own race are excluded from grand jury service. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). The early cases involved absolute exclusion but today the principle is established that substantial under-representation constitutes a constitutional violation, if the cause is purposeful discrimination. *Castaneda*, 97 S.Ct. at 1279; *Turner v. Fouche*, 396 U.S. 346, 359 (1970).

A criminal defendant, in order to prove an equal protection violation in the context of grand jury selection, must first establish that the excluded group is a distinct class, singled out for different treatment under the laws. Next the defendant must prove the degree of under-representation. Finally the defendant must show that the selection procedure is susceptible to abuse. *Castaneda*, 97 S. Ct. at 1280; *Alexander v. Louisiana*, 404 U.S. 625, 630, 632 (1972); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). If substantial under-representation is demon-

[10] Hereinafter, only the masculine designation will be used. The statute uses both.

[11] Tenn. Code Ann. § 40-1706 requires the concurrence of twelve grand jurors to return a true bill. Although the foreman must sign all true bills, his vote is not necessary to indict.

strated and the other requirements shown, then a prima facie case is made and the burden shifts to the state to rebut the case. *Castaneda*, 97 S. Ct. at 1279; *Alexander*, 405 U.S. at 632; *See also, Whitus v. Georgia*, 385 U.S. 545 (1967).

The method of proving an equal protection violation in the context of grand jury selection is sometimes called the "rule of exclusion." This method of proof may give rise to a presumption of unconstitutional action which will prevail if unrebutted. *Washington v. Davis*, 426 U.S. 229, 241 (1976). However, the essential element of inviduous discriminatory purpose is still required. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington*, 426 U.S. at 239. A prima facie case fails when the presumption is dispelled by plausible evidence demonstrating the official action was not racially motivated. *Castaneda*, 97 S. Ct. at 1282; *Turner*, 396 U.S. at 361.

There can be no doubt that a Court of Appeals may set aside a district court's findings in a habeas action only if they are clearly erroneous. Fed. Rule Civ. Proc. 52(a), 81(a)(2); *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1286 (1977) (Stewart, J. dissenting). The district court below dismissed the foreman selection issue, finding "that the foreman was selected for other than racial reasons. . . ." (Appendix C-2) and "that this issue had been adequately investigated by the state trial judge and his determination that there had been no racial discrimination was correct." (Appendix B-2).[12] These findings can not be said to be clearly erroneous.

Certainly, black people are a distinct class satisfying the first element of proof. Further, the Tennessee system, which

[12] The district judge also based his decision on *Stone v. Powell*, 428 U.S. 465 (1976), as is discussed above. Although not cited in his memoranda, the district judge's decision is also a correct application of 28 U.S.C. 2254(d).

allows the criminal judge to exercise his discretion in selecting a foreman, could be used to discriminate. Therefore, in order to make a prima facie case the respondents were required only to demonstrate substantial under-representation over a significant period of time. The proof on this element is very questionable[13] but was sufficient for the district judge to find a prima facie case. The state responded with two affidavits, from the acting foreman and the trial judge. These affidavits demonstrate with frankness and clarity the solely pragmatic reasons why the foreman was selected. Simply stated, the regular foreman was unavailable so the judge chose a former foreman because of his availability, his willingness, his experience, and his demonstrated ability. The reasons for selection are very credible and demonstrate a responsible and natural course of human action which is wholly void of racial consideration. The district court so found and this finding can not be said to be clearly erroneous.

The decision of the Sixth Circuit is contrary to a long, unbroken line of decisions by this Court requiring proof of in-

[13] The opinion of the Sixth Circuit is very misleading on a number of points relating to the evidence adduced by respondents, the rebuttal evidence, and the procedure below:

(a) First, there was no hearing of any kind in district court in this case. All references in the opinion to a "hearing" are to the hearing in state court on the plea in abatement. The transcript of this hearing was before the federal courts.

(b) Second, the opinion states "There has never been a black foreman or forewoman in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen". (*See* Appendix A-5, A-6). In fact, the record shows that the three jury commissioners never testified on this issue whatsoever, and the trial judge's affidavit does speak to his recollection but only to the present. (*See*, state record, Vol. I, pp. 55-71). Therefore, the total evidence of substantial underrepresentation is drawn from the testimony of three foremen. One had only served for two years in the early seventies. One served "5 or 6 years" in the early sixties. The third served "several years" in the fifties. Two of them had also substituted. These recollections form the whole proof of underrepresentation. (*See*, state record, Vol. I, pp. 71-82).

tentional discrimination to sustain an equal protection claim. *See Castaneda*, 97 S. Ct. at 1279; *Washington*, 426 U.S. at 239; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Turner*, 396 U.S. at 361; and *Carter v. Jury Commissioners*, 396 U.S. at 339. Analogous to the facts in *Carter*, the proof here only shows that the post of foreman has not been held by a black according to the recollection of three foremen. Unlike *Carter*, the facts here also show a plausible, credible, non-racially motivated reason for the selection in issue. This reason is different from the general, self-serving explanations rejected by this Court in *Turner*. The reason here is pragmatic and supported by facts admitted by both sides. The rejection of this reason establishes a standard which can only be met by random selection or historical proportional representation. This is contrary to the decisions of this Court. *See especially, Carter*, 396 U.S. at 339.

III

Error, if Any, Was Harmless Beyond a Reasonable Doubt

Assuming, without conceding, error in the selection of the acting foreman and that the issue is cognizable on federal habeas corpus, the error was harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The perceived error involves the selection of the acting foreman. The foreman did not vote for indictment, and his only involvement was to call one witness, swear in the witness, ask the grand jury if they were ready to vote, and sign the indictment. If error, this is a now moot procedural error which had no effect on the integrity of the trial. Ironically, a *Bruton*[14]

[14] *Bruton v. United States*, 391 U.S. 123 (1968).

type error in this case has been declared harmless by all reviewing courts. *Bruton* errors certainly have the potential of affecting the reliability of the fact finding process. The foreman selection error, if any, has no such potential.

CONCLUSION

"Our goals are truth and justice, and procedures are but means to these ends. Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals." Oaks, "Ethics, Morality, and Professional Responsibility," 3 *B.Y.U.L. Rev.* 591, 596 (1975). For these values, and for the other reasons explained in this petition we respectfully pray that a writ of certiorari issue.

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APPENDIX

APPENDIX A

No. 77-1272

United States Court of Appeals
for the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
v.
Jim Rose, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed January 9, 1978

Before: Phillips, Chief Judge, Peck, Circuit Judge, and Gray, Senior District Judge.*

Peck, Circuit Judge. On November 6, 1972, Petitioners James Mitchell and James Nichols, Jr., were indicted for two counts of first degree murder by the Tipton County, Tennessee grand jury. On March 22, 1973, they were found guilty after a jury trial.

Prior to the trial, petitioners filed a pro se motion, asking the trial court to dismiss the indictment because the grand jury and the foreman of the grand jury which indicted them had been selected in a racially discriminatory manner. A pretrial hearing was held and the trial judge, making no written or oral findings

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* Honorable Frank Gray, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

of fact or rulings of law, entered an order which stated in full: "Plea in abatement is overruled."

The ruling was upheld in the Tennessee Court of Criminal Appeals on the grounds that racial discrimination had not been proved, and certiorari to the Tennessee Supreme Court was denied. Petitioners then turned to the federal courts for relief, filing pro se petitions for writs of habeas corpus in the United States District Court for the Western District of Tennessee.

The district judge denied an evidentiary hearing, and ruled that

> the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury made the correct decision on the record before him.

The district judge went on to hold, however, that a prima facie case had been made with respect to the foreman issue, and ordered the state to make further response.

The state submitted two affidavits. The foreman of the grand jury which indicted the petitioners stated that he had not voted on the indictments, and that petitioners were indicted after the grand jury had heard only one witness. The judge who had appointed the foreman also submitted an affidavit, stating, "We called Mr. Smith [the foreman] because he has been willing to act in the past and has experience and does a good job as such foreman." The trial judge's affidavit continued:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foremen very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

On the basis of these affidavits, the district court ordered the dismissal of the petitions for habeas corpus relief, stating:

> [N]o racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The petitioners have appealed that order, contending that they have made out a prima facie case of discrimination in the selection both of the grand jury and of the foreman, which the State of Tennessee has not adequately rebutted. In the alternative, they argue that they have a right to an evidentiary hearing in the district court to further develop the facts.

I

Tennessee uses the "key man" system of jury selection, relying on three jury commissioners appointed by the trial judge to select a pool of prospective grand jurors from the general population. Tenn. Code Ann. § 22-223. Every two years, the commissioners meet to select names "from the tax records and permanent registration records of the county, or other available and reliable sources," § 22-228. The number of names are determined by the judge. The names are recorded officially in a jury list book, § 22-228(a), then written on cards, sealed in a box,

and drawn at random as needed for jury service. The same list serves as jury pool for both grand and petit juries.

The commissioners have a duty to propose a "list of names of upright and intelligent persons known for their integrity, fair character and sound judgment." § 22-228. The basic statutory qualifications for jury service are that a juror must be at least eighteen years old, a United States citizen and a resident of the county in which he or she serves as juror. § 22-201. In addition, persons convicted of "infamous offenses," of unsound mind, with deficient sight or hearing, or habitually drunk are disqualified. Persons in certain exempt occupations or who would suffer hardship if they served are excused.

The foreman or forewoman of the grand jury is selected in an entirely different manner. In essence, they are hand-picked by the trial judge from the eligible population for a two-year appointment. § 40-1506. They are subject to the same statutory qualifications as jurors except that they must be at least twenty-five years old.

II

The facts elicited at the pretrial hearing were meager, especially as to hard figures or even substantiated estimates of the racial makeup of Tipton County grand juries. For instance, there is no indication in the record of the total number of persons in the jury pool, nor is there any indication of the racial makeup of the pool. However, some relevant information may be gleaned from the record.

In 1972, the jury commissioners in Tipton County were three men, all white. The November, 1972 grand jury was selected from the jury pool chosen two years earlier. Names were selected

from the local telephone directory,[1] and all three commissioners testified that they selected names only of persons they knew, either personally or by reputation, and that they were aware of their duty to select, without prejudice, black members of the community.

Very few statistics were mentioned at the hearing, although one commissioner testified that he thought the county was about 30% black. (The 1970 Census shows that Tipton County was 32.4% black.)[2] Neither the total number of names in the jury pool, nor the number of blacks was established, though it is significant that the state could easily have done so. This would prove beyond a doubt that there was no discrimination, if such were true, since a jury list book is a statutory requirement, and since the commissioners are acquainted with everyone on

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[1] Petitioners have challenged the use of the telephone directory as a source of names for jury service. The use of phone books has been upheld in the past, *Gebhard v. United States*, 422 F.2d 281 (9th Cir. 1970), but petitioners, relying on census data, have made a showing that 44.3 percent of Tipton County black households are without telephone service while only 20.7 percent of white households are without such service. The use of voting lists with such disparities has been upheld, but on the grounds that registering to vote is a voluntary act which is reasonable to require of jurors. We need not decide whether obtaining telephone service is a similar voluntary act, but note that the Supreme Court, reversing a district court's finding of no discrimination, has held that

> the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

Turner v. Fouche, 396 U.S. 346, 360 (1970).

[2] The courts may take judicial notice of census figures, absent a showing that they are unreliable for some reason. *Goins v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *cf., Castaneda v. Partida*, 430 U.S. 482, 487-488 (1977).

the list. However, three prior foremen did testify in vague terms about the representation of blacks on the juries themselves.

The three of them had served off and on as grand jury foremen since the early 1950's. None of them could recall a black foreman or forewoman. However, each testified that blacks had served on their grand juries, remembering "several," "some," "probably three or four," "usually two or three," and one black woman on the November, 1972 grand jury that indicted the petitioners.[3]

III

The fundamental rules to be applied in cases charging grand jury discrimination are well established. For almost a century it has been settled law that if a state chooses to use grand juries to return indictments, the jurors must be selected without discrimination because of race or color. In 1879, in its landmark trilogy of cases establishing the right of blacks to serve on juries and grand juries, and the right of every accused citizen to an indictment by a grand jury selected without discrimination, the Supreme Court pointed out:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury . . . selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which

[3] The state presented no rebuttal except the testimony of the Circuit Court Clerk, who agreed with the prosecutor's comment that there had been "a very substantial number of members of the Negro race" on petit and grand juries.

> the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Strauder v. West Virginia, 100 U.S. 303, 309 (1879). Substantial underrepresentation, as a result of purposeful discrimination, is as much a constitutional violation as total exclusion. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970).

There seems to be a common misconception, exemplified by the trial judge's comments at the evidentiary hearing, the district court's opinion dismissing the petition, and respondent's brief, that constitutional requirements are met if there are simply "some" blacks on grand juries. This is probably due to frequent judicial statements that there is no requirement for any particular jury panel to contain blacks, and that the venire need not contain the names of blacks in the same proportion as they are to be found in the general population. Both these statements are quite true; however, they are true because both may occur without discrimination against blacks. However large a percentage of the jury pool are black, any single jury, randomly drawn, may be all white (or, for that matter, all black). Also, neutral legitimate requirements imposed by the state on its jurors may weigh more heavily on one race than another, resulting in percentages different from those in the general population. Whether the presence of a few blacks on grand juries over the years is evidence tending to prove or disprove racial discrimination depends on the proportions of blacks who are qualified for jury service.

The method of establishing a prima facie case of intentional discrimination is also well-established when, as here, the alleged discrimination is aimed at blacks. If over a significant period of time there exists a substantial disparity between the proportion of blacks in the general population, and the pro-

portion called to serve as grand jurors,[4] and the selection procedure affords an opportunity to discriminate or is not racially neutral,[5] then the defendant has made out a prima facie case, and the burden shifts to the state to rebut the case. *Castaneda, supra,* 430 U.S. 482; *Alexander v. Louisiana,* 405 U.S. 625 (1972).

Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another. "There are many possible circumstances which, if they exist

[4] In most reported cases thus far, this statistical analysis has been largely intuitive, based on rough impressions about probabilities. However, given accurate data, the probability that racial results are due to chance can be analyzed mathematically and either affirmed or rebutted with considerable accuracy. For instance, in *Castaneda, supra,* 430 U.S. 482, with a 79.1% Mexican-American population and 39% Mexican-American grand jurors over a period of eleven years, the Supreme Court could determine that the chances of such a result occurring without racial discrimination were less than one in ten to the 140th power and thus could be described as impossible. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966). Statisticians generally reject the possibility that a particular result is due to chance when the probability of that result occurring by chance is less than one in twenty. *Id.* at 359. We need not decide today at what point the courts should similarly reject an assertion that a particular racial result is due to chance rather than discrimination.

[5] While the facial constitutionality of the key-man system has been upheld, it has been frequently recognized as a method particularly subject to abuse, and therefore subject to close scrutiny by the courts. We note, as has the Supreme Court on numerous occasions, that random selection methods similar to the federal system would avoid most of the potential for abuse found in the key man system, and would probably eliminate challenges such as the State of Tennessee faces here. *Castaneda, supra,* 430 U.S. at 497 n. 18.

here, might account lawfully for the observed disparity. The suggestion of their possible existence is not enough, however." *Stephens v. Cox,* 449 F.2d 657 (4th Cir. 1971). The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens.[6] Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case. *Castaneda, supra,* 430 U.S. at 498 n. 19; *Alexander v. Louisiana, supra,* 405 U.S. at 632.

IV

Applying these principles to the grand jury selection in this case is difficult because of the vague nature of the data available. Accepting as true the testimony of the grand jury foremen at the pretrial hearing, over the last quarter-century there has been at least one grand jury which was less than 8 percent (one in thirteen) and one which was nearly 31 percent black (four in thirteen). These figures do not help us, however, because there is no way to tell from the record what average percentage of all the grand juries over those years was black, the only statistic which would help to prove or disprove the existence of discrimination.

We need neither depend on questionable estimates nor remand for a time-consuming hearing,[7] however, because there

[6] *See Turner v. Fouche,* 396 U.S. 346 (1970), in which the Supreme Court rejected the state's attempt to explain the disparity in black representation on juries by arguing, without substantiation, that many blacks were not "upright" or "intelligent" enough to serve.

[7] In *Townsend v. Sain,* 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing must be held on an application for federal habeas corpus relief "unless the state-court trier of facts has after a full hearing reliably found the relevant facts." *Id.,* at 313.

is no guesswork about the figures in the second aspect of petitioners' case. There has never been a black foreman or forewoman of a grand jury in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen. The statutory qualifications are identical to those of jurors except that foremen or forewomen must be a few years older. The position is filled by the trial judge from the general population, thus affording ample opportunity for discrimination, whether conscious or unconscious. While discrimination must be "intended," officials who select grand jurors must be considered to have intended the natural results which flow from their conduct. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Thus a judge who "never really gave any thought" to appointing a black is discriminating just as surely as were the jury commissioners who never selected blacks because their names were "never discussed," *Norris v. Alabama*, 294 U.S. 587 (1935), or because they didn't know any blacks, *Turner v. Fouche*, 396 U.S. 346 (1970). Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination. *Turner, supra*, 396 U.S. 346.

Thus the petitioners clearly established a prima facie case of racial discrimination in the appointment of grand jury foremen and forewomen. The state presented no rebuttal to this case at the hearing, but in response to the district court's request for a further answer to this prima facie case, submitted the two affidavits described above. In dismissing the petitions, the district judge stated that the foreman was "selected for other than racial reasons, and . . . did not vote at the time the indictment was rendered." Thus we must decide whether, as the district court ruled, the state has successfully rebutted the prima facie case.

Perhaps understandably, it appears that the district court has given undue weight to the exculpatory affidavit of the trial judge. In *Alexander v. Louisiana, supra*, 405 U.S. 625, the Supreme Court pointed out that

> the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner v. Fouche, supra*, at 361; *Jones v. Georgia*, 389 U.S. 404, 407 (1967). "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas*, 347 U.S., at 482. . . . The commissioners, in any event, had a duty "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404 (1942).

An absence of blacks qualified to serve as foremen or forewomen has not been demonstrated or even suggested; thus there has been no rebuttal of petitioners' prima facie case.

The fact that the foreman did not vote on petitioners' indictments also fails to support the district court's dismissal. Consideration of this factor is closely linked to the final, implicit question in this appeal: whether proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury. Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue, since the indictment and all proceedings on that indictment are void. *See Castaneda*, 430 U.S. 482. There is no need for the petitioner to show prejudice, and a showing of no prejudice by the state is no defense. *Hill v. Texas*, 316 U.S. 400 (1942).

The question is whether the same result is required when there is discrimination shown only in the selection of the grand jury foreman. While the parties did not brief this issue, it is necessary that we consider it since the district court apparently relied on a finding of no prejudice, pointing out that the foreman rendered no vote on the indictment.

In 1973, this Court held on facts similar to those here that no discrimination had been proved because the particular foreman in question had not been appointed in the usual fashion, but selected in an emergency from among the grand jurors. There was no challenge to the makeup of the grand jury panel. Thus the defendant could not rely on proof of past absence of blacks from the foreman position, along with a selection process susceptible to abuse, because the foreman in this case had not been selected in the same manner. *Hale v. Henderson*, 485 F.2d 266 (6th Cir. 1973), *cert. denied*, 415 U.S. 930 (1974). Not inconsistent with that opinion, we hold today that where a prima facie case of discrimination in the selection of grand jury foremen has been established, and has not been rebutted, "the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." *Hill v. Texas, supra*, 316 U.S. at 406.

The foreman or forewoman is vitally important to the functioning of grand juries in Tennessee, being "the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506. He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments,[8] and like every other chairperson is in a position to

[8] *See* Tenn. Code Ann.,

§40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoena for witnesses to go before the grand jury, unless otherwise ordered by the district attorney.

§40-1622. Power of foreman to administer oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.

§40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill", and the indorsement signed by the foreman.

§40-1709. Presentation of indictment.—An indictment, when found by the grand jury, and indorsed as prescribed by this chapter, shall be presented by the foreman, in their presence, to the court, and filed by the clerk.

guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill. *Bird v. State*, 103 Tenn. 343, 52 S.W. 1076 (1876).

In any case, even without these important duties and powers, the foreman or forewoman is a full member of the grand jury, and we agree with the district court in *Hale v. Henderson*, 336 F. Supp. 512 (W.D. Tenn. 1972), that a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments.

It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

However, it is not simply the possibility of prejudice to a criminal defendant that mandates the reversal of convictions based on unconstitutional indictments. In fact, it is quite clear that a constitutional indictment may be returned by an all-white or an all-black grand jury, and the possibility of prejudice is no less if such a jury makeup occurred by chance rather than by design. Even a white defendant has standing to challenge a grand jury selection process which systematically excludes blacks. *Peters v. Kiff*, 407 U.S. 493 (1972). Many years ago it was recognized that the injury is more subtle, and runs deeper than direct racial prejudice against the defendant:

> [R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Ballard v. United States, 329 U.S. 187, 195 (1946).

In *Peters v. Kiff, supra*, 407 U.S. 493, the state opposed the issuance of the writ to a white prisoner, arguing that

> even if the grand and petit juries were unconstitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

Id. at 498. The Supreme Court expressly rejected this argument, holding that such discrimination by its very existence denies a defendant due process of law:

> [A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

The necessary remedy in such a case is also clear:

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. . . . [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained.

Hill v. Texas, 316 U.S. 400, 406 (1942).

It is therefore ordered that the cause be remanded to the district court for entry of an order providing that petitioners' convictions be set aside, and that within sixty days the petitioners be reindicted, failing which the writ of habeas corpus shall be made absolute and petitioners released from custody.

APPENDIX B

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner

v. Civil C-75-222

Jim Rose, Warden,
Respondent

and

James Nichols, Jr.,
Petitioner

v. Civil C-75-265

Jim Rose, Warden,
Respondent

ORDER DENYING MOTION FOR HEARING, ETC.

(Filed March 23, 1977)

Following our memorandum and order of February 17, 1977, in which we directed that a final judgment be entered for the respondent, an earnest motion for hearing and/or amendment of judgment and/or reconsideration has been filed in behalf of petitioners by the University of Tennessee Legal Clinic. In this motion, supported by memorandum, it is contended that petitioners have made a prima facie case with respect to discrimination in the selection of the trial jury and, further, that petitioners have made a case of discrimination in the selection of the grand jury foreman.

With respect to the first contention, that is, the contention having to do with discrimination in the selection of the trial jury, it appears to the court that the instant motion raises this

issue for the first time, and, as we read the assignments of error in the direct appeal of these convictions, there was no contention that such discrimination occurred with respect to the selection of the trial jury. Since the assignments of error on the direct appeal are the only basis for a showing of exhaustion of state remedies here, it is the opinion of the court that petitioners have not exhausted state remedies insofar as they contend that there was racial discrimination in the selection of the trial jury.

With respect to the other contention in the instant motion having to do with selection of the foreman of the grand jury, this court entered an order on February 17, 1976 dismissing the contention on the ground that this issue had been adequately investigated by the state trial judge and that his determination that there had been no racial discrimination was correct. Since this court made the determination that this contention should be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in **Stone v. Powell,** — U.S. —, 49 L.Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact-finding process so far as the conviction is concerned, if petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in state court to be correct, but also it appears that, since the contention was fairly heard in state court, petitioners are not entitled to another review here. See also: *O'Berry v. Wainright*, — F.2d —, 45 L.W. 2422 (decided Feb. 11, 1977).

Accordingly, the instant motion will be denied.

It is so Ordered.

Enter this 23rd day of March, 1977.

/s/ (Illegible)
Chief Judge

APPENDIX C

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner,
v.
Civil C-75-222
Jim Rose, Warden,
Respondent,
and
James Nichols, Jr.,
Petitioner,
v.
Civil C-75-265
Jim Rose, Warden,
Respondent.

MEMORANDUM AND ORDER

(Filed February 17, 1977)

This cause is before the court following a further reference to the magistrate and receipt of a second report on reference from the magistrate. The reference was for the single purpose of determining whether or not the violation of the *Bruton* rule with respect to petitioner Nichols was harmless beyond a reasonable doubt. The magistrate, after reviewing the evidence, concluded that the violation of the *Bruton* rule was harmless beyond such doubt.

This court, after consideration, is likewise of the opinion that the violation of the *Bruton* rule, considering the content of the violation of the rule and considering the massive other evidence against this petitioner, was harmless beyond a reasonable doubt.

With respect to both petitioners, Mitchell and Nichols, the court is further of the opinion from the record that no racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The Clerk will therefore enter a final judgment dismissing these actions. It is so Ordered.

Enter this 17 day of February, 1977.

(Illegible)
Chief Judge

APPENDIX D

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell,

Petitioner,

v. Civil C-75-222

Jim Rose, Warden,

Respondent,

and

James Nichols, Jr.,

Petitioner,

v. Civil C-75-265

Jim Rose, Warden,

Respondent.

ORDER FOR FURTHER RESPONSE

This cause is again before this court following a reference to the magistrate who filed a report on January 28, 1976.

This court agrees with the magistrate that all claims of petitioners other than their claims having to do with racial discrimination in the selection of the grand jury, including the foreman of the grand jury, and the claim of petitioner Nichols based on *Bruton v. United States*, 391 U.S. 123 (1968), should be dismissed. It is so Ordered.

The court disagrees with the magistrate to the extent that he recommends that a hearing be held with respect to racial

discrimination in the constitution of the grand jury which indicted these petitioners. We are of the opinion, having studied the record made prior to the trial, that the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury, was the correct decision on the record before him.

We do, however, agree with the magistrate that, based upon the same inquiry, it would appear that a *prima facie* case has been made with respect to discrimination in the selection of the foreman of the grand jury. See *Hale v. Henderson*, 336 F.Supp. 512, 349 F. Supp. 567, and 485 F.2d 266. The record does not indicate any evidence introduced to rebut such *prima facie* case.

We further agree with the magistrate that there appears to have been a violation of the *Bruton*, supra, rule with respect to the petitioner Nichols in connection with the examination of the officer who testified concerning the statement made by petitioner Mitchell.

Accordingly, it is Ordered that respondent further answer these petitions directed to the question concerning discrimination in selection of foremen of the grand jury and in connection with the claimed violation of the *Bruton* rule and, good cause appearing, twenty-three (23) days are allowed in which to answer.

Enter this 17th day of February, 1976.

/s/ (Illegible)
Chief Judge

APPENDIX E

In the Supreme Court of Tennessee
at Jackson

James Nichols, Jr. and James Mitchell,
Petitioners

v.

State of Tennessee,
Respondent

Tipton Criminal
No. 1

In Re: Petition for Writ of Certiorari of James Nichols, Jr. and James Mitchell

Upon consideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Criminal Appeals has correctly dealt with the issues.

The writ is denied.

Per Curiam

OFFICE OF CLERK OF THE SUPREME COURT
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order Denying Petition for the Writ of Certiorari of said Court, pronounced March 10, 1975, in case of James Nichols, Jr. and James Mitchell against State of Tennessee as appears of record now on file in the office of the Clerk at Jackson.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 20th day of June, 1975.

Ramsey Leathers
Clerk
By .....
Deputy Clerk

APPENDIX F

In the Court of Criminal Appeals of Tennessee
Jackson, March, 1974

James Nichols, Jr. and James Mitchell
Plaintiffs-in-Error

v.

State of Tennessee,
Defendant-in-Error

No. 1
Tipton County
Hon. Herman L. Reviere, Judge
(First Degree Murder)

For the Plaintiffs-in-Error:

Wilbur F. Cash and
John E. Proctor
Covington, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Weldon B. White, Jr.
Assistant Attorney General

Will Terry Abernathy
District Attorney General

Preston Parks
Assistant District Attorney General

Opinion Filed: June 5, 1974
Affirmed

WILLIAM S. RUSSELL
Judge

OPINION

James Nichols, Jr., and James Mitchell, the plaintiffs-in-error were jointly indicted in two separate indictments for the murder

in the first degree of William Nabors and Claudie Greer. Plaintiffs-in-error were tried, found guilty of murder in the first degree, and sentenced to consecutive sentences of sixty years in the penitentiary in each case.

The murders arose out of the armed robbery by Nichols and Mitchell of a cafe in Tipton County. The lengthy record reflects that Nichols, with a pistol in each hand, informed the proprietor that it was a stickup and forced him to hand over the cash register receipts of about five or six hundred dollars. Nichols also took money from the person of the proprietor and others, fired several shots into the back room, and fled.

Simultaneously Mitchell, armed with a sawed-off shot gun, was in the back room of the cafe robbing some patrons who were engaged in a dice game. One of those gambling was William Nabors, who was shot in the mouth by Mitchell when Nabors bent over to pick up some change on the floor. Mitchell also went into the front room and took some money from the proprietress and then left. Claudie Greer was killed by a shot from a .38 calibre pistol. Witnesses in the back room testified they saw Greer fall after they heard shot from the front room.

The extensive record contains the testimony of many eyewitnesses. All of them were in a good position to observe the stickup men at close range over a considerable period of time, and all witnesses positively identified plaintiffs-in-error as the men who perpetrated these brutal murders. Nichols was later arrested with a .38 calibre pistol in his possession, and a sawed-off shotgun was found at the apartment of Mitchell's girl friend. In addition, the Memphis police were given a confession to the crime by Mitchell, the substance of which was related to the jury by the police officer who took it.

In view of the foregoing, we overrule the assignments of error attacking the legal sufficiency of the convicting evidence. It is

the often-stated rule that this court cannot reverse on the facts unless the evidence is shown to preponderate against the verdict of the jury and in favor of the innocence of the accused. Plaintiffs-in-error have not made such a showing. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173.

The third assignment states that it was error not to sustain the plea in abatement to the indictment because the proof showed that no Negro had ever served as foreman of the grand jury, and that the eligible grand jurors were selected from the telephone directory.

The Tipton County jury commissioners were put on the stand during the hearing on this matter, and they testified that they were aware of the need to select a proper racial balance and sought out the names of blacks they knew personally or by reputation. A sizable number of blacks and people of low income were shown to have in fact served on the jury panels. Past grand jury foremen testified as to the presence of blacks on the grand jury. A black who served on the grand jury who indicted plaintiffs-in-error testified that there was no hostility toward Negroes on the part of the other jurors. "The question of whether there has or has not been shown such a systematic exclusion of racial groups as to violate the rights of an accused is, necessarily, largely one of fact in each case." *State v. Johnson*, 220 Tenn. 49, 413 S.W.2d 694. The facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds, and the assignment of error is overruled.

Plaintiffs-in-error, in their fourth assignment of error, contend that it was error to fail to suppress the pistol and shotgun obtained as a result of their arrest, said arrest being without a warrant and no search warrant having been obtained.

T.C.A. §40-803 permits an officer to make an arrest, without a warrant, when a felony has in fact been committed, and he

has reasonable cause for believing the person arrested committed it. The facts show that the police had reasonable cause to believe plaintiffs-in-error had committed the Tipton County murders, and that they also knew that plaintiffs-in-error were to leave town the following day. Under the circumstances, an arrest was proper. The pistol was found incident to the arrest and was properly admitted into evidence. *Goodner v. State*, 3 Tenn.Crim.App.569, 464 S.W.2d 339. It also appears that the officers were invited into the apartment to search by its owner, and a search with the permission of the owner is not an unreasonable search. *Deerfield v. State*, 220 Tenn.546, 420 S.W. 2d 649.

The *Deerfield* case also applies with respect to the seizure of the sawed-off shotgun, since it was found at another location pursuant to a search after the owners of the premises had voluntarily given the police permission to search.

The fifth assignment of error complains of the action of the trial court in consolidating for trial the two cases of murder. The cases were properly consolidated because both murders arose out of the robbery of White's Cafe by plaintiffs-in-error. When the offenses charged are similar, related, or connected such consolidation is proper. *State ex rel. Gann v. Henderson*, 221 Tenn.209, 425 S.W.2d 616.

The sixth assignment of error argues that it was error not to sever the trials of Mitchell and Nichols because a confession of Mitchell was read to the jury. Plaintiff-in-error Nichols reasons that this confession, made in his absence, denied him the right to confront Mitchell who did not take the stand. Generally, the granting of a severance addresses itself to the sound discretion of the trial court, and we find no abuse of that discretion here. *O'Neil v. State*, 2 Tenn.Crim.App.518, 455 S.W.2d 597. No reference to Nichols was made in the confession, and we do not think the jury was prejudiced against Nichols in hearing it. The

test in granting a severance is a "likelihood of substantial prejudice" if tried together. *Hoskins v. State*, — Tenn.Crim.App.—, 489 S.W.2d 544. The facts in this case do not meet this test, and the motion for severance was properly denied.

Plaintiffs-in-error, who were indigent, requested a mental examination to determine if they were capable of defending the charges against them. In their seventh assignment of error, they say that it was error for the trial court to refuse to order such an examination. Both plaintiff-in-error had been before the trial court prior to the request for the mental examination and had presented, pro se, a motion to suppress certain evidence. The trial court had other opportunities to observe them, and concluded that they were capable of conferring with counsel. We find no basis in the record for a holding of prejudicial error in denying the mental examination.

In the eighth assignment of error, plaintiffs-in-error complain of the trial court's failure to grant them a continuance until April 16, 1973 in order to locate additional witnesses who might have been helpful in their defense. Plaintiffs-in-error were indicted on November 6, 1972, and the actual trial commenced on March 21, 1973. The record shows that the trial court did grant a continuance to obtain additional defense witnesses, even bringing in one witness plaintiffs-in-error stated they needed but who was released prior to trial. Four other defense witnesses for whom a continuance had been granted were not put on by the defense.

We have held that a motion for continuance is within the sound discretion of the trial court, and we find no abuse of discretion in denying a continuance. *Frazier v. State*, 3 Tenn. Crim.App.696, 466 S.W.2d 535. Under the facts in this case, we find that there was a reasonable time in which to prepare a defense, and further delay would have served no purpose.

See *State ex rel. Leighton v. Henderson,* 1 Tenn.Crim.App.598, 448 S.W.2d 82. No prejudice has been demonstrated.

The ninth assignment of error states that the trial court erred in granting a severance as to one Jesse Ford, a co-defendant indicted along with Nichols and Mitchell for the murder of Nabors and Greer. The plaintiffs-in-error contend that by severing Ford's case from theirs, they were deprived of possible help from Ford's testimony who because of his right against self-incrimination, could not be forced to testify against his will on their behalf. That this argument has no merit can readily be seen, since even had Ford been tried with plaintiffs-in-error, he would not have had to take the stand against his will.

The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847." The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State,* 187 Tenn.174, 213 S.W.2d 195.

Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown,* 209 Tenn. 141, 351 S.W.2d 385, "The Court has the power, and it is his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form." In light of the above, the

trial court acted properly and the final two assignments of error are overruled.

Affirmed.

/s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL, Judge

Concur:

/s/ MARK A. WALKER
MARK A. WALKER, Presiding Judge

/s/ W. WAYNE OLIVER
W. WAYNE OLIVER, Judge

OFFICE OF CLERK OF THE COURT OF
CRIMINAL APPEALS
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced June 5, 1974, in case of James Nichols, Jr. and James Mitchell vs. State of Tennessee as appears of record now on file in the office of the Clerk at Jackson.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 20th day of June, 1975.

/s/ RAMSEY LEATHERS, Clerk
By ....., Deputy Clerk